EXPLANATORY MEMORANDUM TO

THE JUDICIAL APPOINTMENTS ORDER 2008

2008 No. 2995

1. This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1. The Judicial Appointments Order 2008 provides that Fellows of the Institute of Legal Executives (ILEX) are relevant qualifications for the purposes of determining eligibility for the judicial offices listed in Schedule 1 to the Order. The Order also provides that registered patent agents and registered trade mark agents hold relevant qualifications for the purposes of determining eligibility for the judicial offices listed in Schedule 2.

2.2. A registered patent agent is a person whose name is entered into the register kept by the Chartered Institute of Patent Agents (CIPA).

2.3. A registered trade mark agent is a person whose name is entered into the register kept by the Institute of Trade Mark Attorneys (ITMA).

2.4. Experience of intellectual property work is a prerequisite for entry into either register.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Order is the first use of the power in section 51 of the Tribunals, Courts and Enforcement Act 2007 (2007 Act). This power enables the Lord Chancellor to specify that a qualification is a relevant qualification for the purposes of sections 50(2) and (3) of the 2007 Act. A qualification may only be specified for these purposes if it is either awarded by the Institute of Legal Executives or by another body specified as an authorised body for the purposes of sections 27 or 28 of the Courts and Legal Services Act 1990. The Chartered Institute of Patent Agents was designated as an authorised body for the purposes of sections 27 and 28 of the 1990 Act by the Chartered Institute of Patent Agents Order 1999 (SI 1999/3137). The Chartered Institute of Trade Mark Attorneys was also designated as an authorised body for these purposes by the Institute of Trade Mark Attorneys Order 2005 (SI 2005/240).

4. Legislative Background

4.1. The 2007 Act contains 3 sections (50-52) revising the eligibility requirements for judicial appointment. Section 50 introduces the judicial-appointment eligibility condition and provides that where reference is made to the judicial-appointment eligibility condition in relation to eligibility for judicial office in statute candidates for judicial office must hold a relevant qualification and have gained experience in law over a period whilst holding that qualification. Section 50(4) of the 2007 Act provides that a person holds a relevant qualification if the person is a solicitor or barrister or holds a qualification specified in an order made under section 51(1) of that Act in relation to offices identified in the order.

4.2. Section 52 of the 2007 Act defines what is meant by gaining experience in law for these purposes.

4.3. Eligibility for specific judicial offices, for the most part, is set out elsewhere in statute. Schedule 10 to the 2007 Act substitutes, where relevant, reference to the judicial-appointment eligibility condition in place of the existing eligibility requirements for specified offices and also lowers the number of years' experience required from 10 to 7 and from 7 to 5 years.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales, Scotland and Northern Ireland.

6. European Convention on Human Rights

6.1. Bridget Prentice MP, the Minister of State, has made the following statement regarding Human Rights:

"In my view the provisions of the Judicial Appointments (Relevant Qualification) Order 2008 are compatible with the Convention rights."

7. Policy Background

7.1. The policy objective of the Order is to broaden the pool of potential applicants for specified judicial offices with the aim that this will increase judicial diversity. This will ensure that the eligibility criteria for judicial office reflect appropriate changes across the legal profession.

7.2. Annual statistics released by the Judicial Office on their website demonstrate that women, people from a Black or Asian minority ethnic background and people with disabilities are under-represented in the judiciary. Research done by the

former Department for Constitutional Affairs between 2002 and 2006 showed that public confidence in the judiciary was affected by the diversity of the judiciary and the public feeling that the judiciary understood their diverse backgrounds (see Housing possession cases in the county court: Perceptions and experiences of black and minority ethnic defendants 2002, Ethnic Minorities in the Criminal Courts: perceptions of fairness and equality of treatment 2003 and Tribunals for diverse users 2006 for more details). These reports are available on the former DCA website that is live as an archive site.

7.3. A joint project board comprising a number of stakeholders including representatives from the Judicial Appointments Commission and Directorate of Judicial Office as well as the Ministry of Justice has met regularly over a period of some months to develop the policy in the Order.

7.4. The Order also sets out the point from which the qualification period commences for the purposes of judicial eligibility.

7.5. Guidance for the Judicial Appointments Commission in relation to the impact of this Order on eligibility for judicial office has been developed by Ministry of Justice officials in consultation with representatives from the Directorate of Judicial Office and Judicial Appointments Commission.

7.6. The level of public interest in the policy has been minimal. A consultation paper was published on 5 February 2008 and closed on 29 April 2008 on the MoJ website (http://www.justice.gov.uk/publications/judicial-app-050208.htm). The consultation paper was also sent directly to the organisations listed in para 7.7. No individual members of the public responded to the consultation, however Creekside Forum (a South London residents' group), the Civil Court Users Association and the Competition Appeals Tribunal responded. There has been no media interest to date.

7.7. The Order making power provides for consultation with the Lord Chief Justice and the Judicial Appointments Commission (JAC). This consultation took place from 4th February 2008 to 29th April 2008. The SI was drafted in conjunction with a Project Board consisting of the MoJ, the Judicial Office (JO), the JAC, the Tribunals Service and the Judicial Studies Board (JSB). The Order was sent to the following organisations and people for comment:

- Association of District Judges
- Association of Muslim Lawyers
- Association of Women Solicitors
- Bar Council
- Chartered Institute of Patent Attorneys
- Confederation of British Industry
- Department of Business, Enterprise and Regulatory Reform

- Her Majesty's Courts Service
- Institute of Legal Executives
- Institute of Trade Mark Attorneys
- Judicial Appointments Commission
- Judicial Office
- Judicial Studies Board
- Law Society
- Lawyers Christian Fellowship
- Lesbian and Gay Lawyers Association
- Lord Chief Justice
- MoJ Disability Advisor
- Parliamentary Justice Committee
- Scotland Office
- Society of Asian Lawyers
- Society of Visually Impaired Lawyers
- Trades Union Congress
- Tribunals Service – CEO and Directors
- UK Association of Women Judges
- Wales Office
- Welsh Assembly Government

7.8. There was a range of views in response to the consultation, both in favour of the proposals and raising reservations.

7.9. The organisations representing those who would be newly eligible under the proposals - ILEX, ITMA and CIPA - were in favour of the proposed extension of eligibility. However, the President of ILEX did express disappointment that Fellows of ILEX would not be eligible for District Judge, or District Judge (Magistrates' Courts) posts until 2010. This approach was taken to maintain the policy principle that those newly eligible should be eligible only for more junior level posts. Over time it is envisaged that Fellows of ILEX will be able to amass sufficient experience to apply for more senior level posts.

7.10. Most other respondents also supported the extension of eligibility although the Association of District Judges expressed reservations about extending eligibility, on the grounds that it would represent a threat to quality and raise false hope of judicial appointment to Fellows of ILEX. The CBI was strongly opposed to the extension, as they felt that Fellows of ILEX might not have enough experience to sit on Employment Tribunals, and they expressed a wish that standards were not watered down. Discussions with the TUC and the President of the Employment Tribunals, confirmed that they also had concerns about the impact of the changes on quality of appointments to the Employment

Tribunal. Following discussions with the MoJ and the JAC, it was accepted that the proposal that Employment Tribunals should be included on the list, on the basis that the question of whether Fellows of ILEX had the necessary skills and experience was ultimately a matter for the selection process to decide.

7.11. The Competition Appeals Tribunal (CAT), the Lord Chief Justice and the Association of District Judges all considered that the former entry relating to the CAT should be removed from the list of posts that ILEX Fellows would be eligible for. This is because, although the CAT posts are open to lawyers with five years post qualification legal experience, the reality is that the level and work is more akin to a High Court post. The MoJ policy team considered this, and accepted the recommendation to remove the CAT from the list of posts ILEX Fellows would be eligible for.

7.12. The JAC were content with the proposals. They asked the MoJ to review the operation of the Statutory Instrument two years after it had come into effect, to enable a more effective assessment of the impact of the Order. MoJ were happy to agree to that approach.

8. Impact

8.1 No Regulatory Impact Assessment has been prepared because there is no regulatory impact on any part of the private or voluntary sector in respect of the clauses of the Tribunals Courts and Enforcement Act 2007 which relate to the matters covered under this Order. A RIA was carried out in respect of the Act as a whole.

9. Contact

Any enquiries about the contents of this memorandum should be addressed to Philippa Baker, Legal and Judicial Diversity Branch, Ministry of Justice.
Email: *philippa.baker@justice.gsi.gov.uk*
Tel: *020 7210 1833*